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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Revisions of Part 22 and Part 90 of the Commission's Rules to Facilitate Future Development of Paging Systems	)	WT Docket No. 96-18
	)	
Implementation of Section 309(j) of the Communications Act — Competitive Bidding	)	PP Docket No. 93-253

To: The Commission

PETITION FOR RECONSIDERATION
OR CLARIFICATION

Western Paging I Corporation and Western Paging II Corporation(hereinafter collectively referred to as "Petitioners"), by their attorneys and pursuant to Section 1.429 of the Commission's Rules, 47 C.F.R. §1.429, hereby seeks reconsideration or clarification of the Commission's *Second Report and Order and Further Notice of Proposed Rulemaking*, released February 24, 1997 in the above-captioned proceeding (hereinafter "*Second R&O*"). In support of this Petition, the following is respectfully shown:

Petitioners are licensees of Paging and Radiotelephone Service ("PARS") stations throughout the States of Idaho, Montana, Nebraska, North Dakota, Oregon, South Dakota, Washington, and Wyoming. Petitioners have several pending PARS applications. One of these applications is the subject of pending litigation which has been pending since March 2, 1995.

In the *Second R&O*, the Commission granted the Chief of the Wireless Telecommunications Bureau (the "Bureau") delegated authority to:

> dismiss all mutually exclusive paging applications filed as of the adoption date of this *Order* and grant or dismiss all non-mutually exclusive paging applications filed as of the adoption

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date of this *Order*.

Second R&O, at ¶227.

Petitioners believe that this directive is unlawful and should be set aside. First, the directive is not rationally related to any public interest objective articulated in the rulemaking. See, Committee for Effective Cellular Rules v. FCC, 53 F.3d 1309, 1317 (D.C. Cir. 1995). Second, in the absence of a compelling public interest, applicants who have timely filed under the agency's cut-off rules have strong equities which may not be ignored. McElroy Electronics Corp. v. FCC, 86 F.3d 248 (D.C. Cir. 1996). Third, pursuant to Section 309(j)(6)of the Communications Act of 1934, as amended (the "Act"), Congress specifically warned the Commission that:

> [n]othing in this subsection, or in the use of competitive bidding, shall - (E) be construed to relieve the Commission of the obligation in the public interest to continue to use engineering solutions, negotiation, threshold qualifications, service regulations, and other means in order to avoid mutual exclusivity in application and licensing proceedings;

47 U.S.C.§309(j)(6). The Commission's order, which requires universal dismissal of pending applications merely because they are mutually exclusive, and without regard to their compliance with Part 22 of the Commission's Rules, clearly contravenes Section 309(j)(6)(E) of the Act.

Without prejudice to the foregoing arguments, Petitioners have filed the subject petition to seek clarification on two important points where the Commission's directive is silent. Additionally, Petitioners seek clarification of new Section 22.503(i) of the Rules.

First, in delegating authority to the Bureau to dismiss all pending mutually exclusive applications, the Commission did not specify whether the Bureau is to dismiss an entire application, or just the sites that are subject to mutual exclusivity.[1/] It is Petitioners' understanding from a

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[1/] For example, assume that Petitioners have a single application (FCC Form 600) proposing to construct facilities at locations A, B and C. The facility proposed at location A is

(continued...)

conversation with the Bureau's staff that the Bureau may dismiss only the request for the mutually exclusive location, not the entire application. However, Petitioners request that the Commission clarify that only mutually exclusive locations, not entire applications, should be subject to dismissal pursuant to the Bureau's delegated authority.

Second, the Commission was silent with regard to the treatment of applications which appear to be mutually exclusive, but in light of pending litigation, are not. In this regard, Petitioners request that the Commission clarify that the Bureau must first resolve pending litigation, before determining whether a specific location is subject to mutual exclusivity. As discussed above, Section 309(j)(6)(E) of the Act requires that the Commission consider "engineering solutions, negotiation, threshold qualifications, service regulations, and other means" before making a determination that an application is mutually exclusive. 47 U.S.C. §309(j)(6)(E). Thus, where applications appear to be mutually exclusive, but one or more of them may be defective under the Commission's Rules, the Commission must first resolve the outstanding legal issues before determining whether there is, in fact, mutual exclusivity.

In addition to clarifying its directive to the Bureau, the Commission must modify new Section 22.503(i) of the Rules. Section 22.503(i) of the Rules provides that geographic licensees:

> must provide co-channel interference protection . . . to all co-channel facilities of other licensees within the paging geographic area that were authorized on [insert effective date of this rule] and have remained authorized continuously since that date.

Second R&O at Appendix A, page 18. Thus, Section 22.503(i) extends interference protection to all "authorized" incumbent transmitters. Petitioners request that the Commission clarify that

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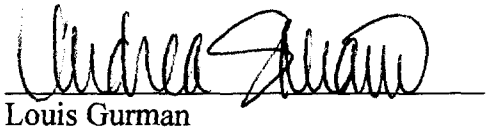
1/(...continued)
mutually exclusive with another timely filed applicant, locations B and C are not. The Commission has not stated whether it will dismiss the entire application, or only Petitioners' request for authority to construct the facility at location A.

"authorized" encompasses valid construction permits -- i.e. construction permits issued pursuant to all site-specific applications filed before August 1, 1996 and ultimately granted by the Commission -- and authorizations granted or reinstated upon resolution of litigation currently pending before the Commission. It is imperative that all authorized transmitters are entitled to full interference protection, and will be included in the determination of incumbent's composite interference contours, irrespective of grant date.

In light of the foregoing, Petitioners respectfully request that the Commission reconsider or clarify its *Second R&O*. Specifically, the Commission should clarify its directive to the Bureau to ensure that: (1) only requests for locations that are mutually exclusive, not entire applications, are subject to dismissal; and (2) where an application is subject to pending litigation, the litigation is resolved prior to dismissing the application as mutually exclusive. Moreover, the Commission should clarify that the term "authorized" in Section 22.503(i) of the Rules includes valid construction permits and authorizations granted or reinstated upon resolution of litigation.

Respectfully submitted,

WESTERN PAGING I CORPORATION
WESTERN PAGING II CORPORATION

By: 

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